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MERRITT COLLEGE
and SHIRLEY MACK
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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 ELIZABETH SANTOS) CASE NO. C 07 5227 EMC
12 Plaintiff,)
13 vs.)
14 MERRITT COLLEGE, SHIRLEY MACK, an)
individual and DOES 1-10, inclusive,)
15 Defendants.)
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17) Time: 10:30 a.m.
18) Judge: Hon. Edward M. Chen
19) Location: Courtroom C, 15th Fl.)
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I. INTRODUCTION

2 Every claim asserted by Plaintiff ELIZABETH SANTOS (“Plaintiff”) against Defendants
3 MERRITT COLLEGE¹ and SHIRLEY MACK (collectively “Defendants”) must be dismissed
4 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief
5 can be granted. First, Plaintiff’s claims for violation of the Fair Employment and Housing Act
6 (“FEHA”) fail as a matter of law, as Plaintiff is not, and has never been, an “employee” of
7 Defendant MERRITT COLLEGE. Second, Plaintiff’s claims for “failure to prevent, investigate
8 and remedy harassment” and for age discrimination in violation of 42 U.S.C. Section 1981
9 (“Section 1981”) fail as a matter of law as Section 1981 is strictly limited to claims of racial
10 discrimination. Third, Plaintiff’s claim for race discrimination in violation of Section 1981 fails
11 as a matter of law because public entities are not “persons” subject to suit, and an individual
12 cannot be held liable for “discrimination” under the statute. Fourth, Plaintiff’s claims for
13 negligent misrepresentation and breach of implied-in-fact contract fail as a matter of law because
14 the Tort Claims Act abolished all common law and judicially declared forms of liability against
15 public entities. Fifth, Plaintiff’s claim for intentional infliction of emotional distress fails as a
16 matter of law because Plaintiff’s First Amended Complaint does not plead compliance with the
17 claim presentation requirements of the Tort Claims Act and, further, Plaintiff has failed to plead
18 facts sufficient to state such a claim..

II. FACTS ALLEGED BY PLAINTIFF

20 Plaintiff is a student of Defendant MERRITT COLLEGE. Plaintiff alleges that on five
21 (5) occasions between September 28, 2005 and November 8, 2005, Defendant MACK, a tenured
22 Librarian employed by the College, wrongfully accused Plaintiff of improperly using College
23 computers for personal use in violation of library policy, thereby "forcing" Plaintiff to leave the
24 library. (Plaintiff's Complaint at ¶¶ 7, 8, 10, 15 and 16.) Plaintiff further alleges that on one

26 ¹ Defendant MERRITT COLLEGE is part of the Peralta Community College District. The District, established in
27 1964, is a system of public two-year colleges, serving the residents of the cities of Oakland, Berkeley, Alameda,
28 Piedmont, Emeryville and Albany. It consists of four colleges and two community education centers. The District
 has educated more than a million students since its founding, the majority of which are minorities.

1 occasion, nearly one year later, Defendant MACK asked Plaintiff and a classmate to stop talking
 2 in the library while allowing others to continue talking. (Plaintiff's Complaint at ¶ 22.)

3 **III. LEGAL AUTHORITY**

4 **A. Federal Rule of Civil Procedure 12(b)(6)**

5 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may make a motion to
 6 dismiss for "failure to state a claim upon which relief can be granted." A dismissal pursuant to
 7 Rule 12(b)(6) is proper where there is an "absence of sufficient facts alleged under a cognizable
 8 legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1999). Moreover,
 9 although the Court must construe the facts in the light most favorable to the non-moving party,
 10 the Court need not accept as true conclusionary allegations, legal characterizations, unreasonable
 11 inferences, or unwarranted deductions of fact. *Beliveau v. Caras*, 873 F. Supp. 1393, 1395-1396
 12 (C.D. Ca. 1995); *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). Finally, a
 13 court need not assume that a plaintiff can prove facts different from those it has alleged. *Assoc.*
 14 *Gen. Contractors of Calif. v. Calif. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

15 **IV. LEGAL ARGUMENT**

16 **A. Plaintiff's Claims For Violation Of FEHA Fail As A Matter Of Law As
 17 Plaintiff Has Never Been An Employee Of MERRITT COLLEGE**

18 The FEHA provides that it shall be an unlawful **employment** practice, unless based upon
 19 a bona fide occupational qualification, or, except where based upon applicable security
 20 regulations established by the United States or the State of California:

21 (a) For an employer, because of the race, religious creed, color, national origin,
 22 ancestry, physical disability, mental disability, medical condition, marital status,
 23 sex, age, or sexual orientation of any person, to **refuse to hire or employ** the
 24 person or to refuse to select the person for a training program **leading to
 25 employment**, or to **bar or to discharge the person from employment** or from a
 26 training program **leading to employment**, or to discriminate against the person in
 27 compensation or in **terms, conditions, or privileges of employment**.

28 (j) For an employer, labor organization, employment agency, apprenticeship
 29 training program or any training program leading to employment, or any other
 30 person, because of race, religious creed, color, national origin, ancestry, physical
 31 disability, mental disability, medical condition, marital status, sex, age, or sexual
 32 orientation, **to harass an employee, an applicant, or a person providing
 33 services pursuant to a contract**.

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1 Government Code §§ 12940(a), (j) (emphasis added).

2 In order to recover under the provisions of FEHA, an aggrieved plaintiff must
 3 demonstrate the existence of an employment relationship. *Vernon v. State of California*, 116
 4 Cal.App.4th 114, 124 (2004); *Mendoza v. Town of Ross*, 128 Cal.App.4th 625, 631 (2005)
 5 (because compensation of some sort is indispensable to the formation of an employment
 6 relationship, volunteers who receive no direct or indirect financial benefit for their services do
 7 meet the definition of “employee” for FEHA purposes); *Shephard v. Loyola Marymount Univ.*,
 8 102 Cal.App.4th 837, 842 (2002) (appellate court rejected plaintiff’s claim that her status as a
 9 student athlete compensated by scholarship made her an “employee” of University for purposes
 10 of FEHA).

11 Here, Plaintiff alleges that she is a “student” at MERRITT COLLEGE. (Plaintiff’s
 12 Complaint at ¶ 4.) Plaintiff does not allege that she is, or that she has ever been, in an
 13 employment relationship with Defendant MERRITT COLLEGE in any capacity, or that she ever
 14 “provided services” to Defendants under the terms of any contract. Pursuant to the express
 15 language of FEHA, and well-settled authority, Plaintiff’s status as a “student” of Defendant
 16 MERRITT COLLEGE does not entitle her to the protections of FEHA. Accordingly, Plaintiff’s
 17 First Cause of Action for alleged violations of FEHA must be dismissed as a matter of law.²
 18

19 **B. Plaintiff’s Claims For “Failure To Prevent, Investigate And Remedy
 20 Harassment” And For Age Discrimination In Violation Of Section 1981 Fail
 21 As A Matter Of Law As Section 1981 Is Strictly Limited To Claims Of Racial
 22 Discrimination**

23 Section 1981 provides that:

24 All persons within the jurisdiction of the United States shall have
 25 the same right in every State and Territory to make and enforce
 26 contracts, to sue, be parties, give evidence, and to the full and
 27 equal benefit of all laws and proceedings for the security of
 28

² To the extent Plaintiff argues she is entitled to pursue a FEHA claim because she received a right to sue letter from the Department of Fair Employment and Housing (“DFEH”), the argument should be rejected. Indeed, an examination of **Exhibits A(1) and A(2)** to Plaintiff’s First Amended Complaint reveals that Plaintiff did not disclose her “student” status to the DFEH in her Complaint of Discrimination. Accordingly, it could not have been clear to the DFEH that Plaintiff is not, and has never been, an employee of Merritt College or Ms. Mack. These exhibits further reveal that Plaintiff “requested an immediate right to sue letter” from the DFEH, thereby preventing the DFEH from investigating her Complaint, or discovering the absence of an employment relationship.

1 persons and property **as is enjoyed by white citizens**, and shall be
 2 subject to like punishment, pains, penalties, taxes, licenses, and
 3 exactions of every kind, and to no other.

4 42 U.S.C. §1981(a) (emphasis added).

5 Section 1981 prohibits racial discrimination in employment. *Miller v. Fairchild*
 6 *Industries, Inc.*, 885 F2d 498, 503 (9th Cir. 1989). “Analysis of an employment discrimination
 7 claim under §1981 follows the same legal principles as those applicable in a Title VII disparate
 8 treatment case ... Both require proof of discriminatory treatment and the same set of facts can
 9 give rise to both claims.” *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F3d 840, 850
 10 (9th Cir. 2004). Unlike Title VII however, Section 1981 is strictly limited to race and national
 11 origin/ancestry discrimination claims. Indeed, Section 1981 protects “identifiable classes of
 12 persons who are subjected to intentional discrimination solely because of their ancestry or ethnic
 13 characteristics ...” *St. Francis College v. Al-Khazraji*, 481 US 604, 613 (1987); *El-Hakem v.*
 14 *BJY Inc.*, 415 F3d 1068, 1073 (9th Cir. 2005); see also *Runyon v. McCrary*, 427 US 160, 167
 15 (1976) (Section 1981 does not apply to discrimination based upon sex or religion [as Title VII
 16 does]).

17 Here, Plaintiff’s First Cause of Action alleges that Defendant MACK (and possibly
 18 Defendant MERRITT COLLEGE – the pleading is unintelligible in this regard) failed to
 19 “prevent, investigate and remedy harassment” in violation of Section 1981. (Plaintiff’s
 20 Complaint at 8:8-10.) Plaintiff’s Fourth Cause of Action further alleges discrimination based
 21 upon “age” in violation of Section 1981. (Plaintiff’s Complaint at 13:18-20.) Pursuant to the
 22 plain wording of the statute, and the authority set forth above, Section 1981 is limited to claims
 23 of *race and national origin discrimination*. Accordingly, Plaintiff’s claims for failure to
 24 “prevent, investigate and remedy harassment,” and for “age” discrimination in violation of
 25 Section 1981, must be dismissed as a matter of law.

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C. Plaintiff's Claim For Race Discrimination In Violation Of Section 1981 Fails As A Matter Of Law

1. Defendant MERRITT COLLEGE Is Not a "Person" Subject to Suit

Plaintiff's Fourth Cause of action alleges that Defendant MERRITT COLLEGE discriminated against Plaintiff on the basis of her race in violation of Section 1981. This claim must be dismissed. "42 U.S.C. sections 1981 and 1983 prohibit certain unconstitutional conduct by "persons.'" *Rucker v. Regents of the University of California*, WL2623993 (N.D. Cal. 2004), *2. In *Rucker*, Judge Jenkins of the Northern District of California granted a motion to dismiss filed by the Regents of University of California pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that The Regents is not a "person" subject to suit under Section 1981 or 1983. *Id.*

In reaching this decision, Judge Jenkins relied upon the reasoning of the Ninth Circuit Court of Appeals in *Armstrong v. Myers*, 964 F.2d 948, 949-50 (9th Cir.1992). There, the Ninth Circuit noted that The Regents “is an arm of the state for Eleventh Amendment purposes, and therefore is not a ‘person’ within the meaning of section 1983.” Judge Jenkins reasoned, “The Ninth Circuit has not decided whether the definition of “person” is the same in each statute. This Court, however, can think of no reasoned basis to construe section 1981 more broadly than section 1983. The principles underlying The Regents’ immunity from suit would seem to apply with equal force in both contexts.” *Rucker*, WL2623993 (N.D. Cal. 2004), *2. Judge Jenkins further noted that, “courts from other jurisdictions have decided “person” carries the same meaning in each statute.” See, e.g., *An- Ti Chai v. Michigan Technological University*, 493 F.Supp. 1137, 1148 (W.D. Mich. 1980) (“ ‘persons’ under Section 1983 are ‘persons’ under Section 1981. In the same light, parties with immunity under Section 1983 should retain that same immunity under Section 1981.”)

Like The Regents of the University of California, Defendant MERRITT COLLEGE, of the Peralta Community College District, is considered an arm of the state for Eleventh Amendment purposes and is therefore not a "person" subject to section 1983 suits. Indeed the

1 Ninth Circuit has consistently held that California community college districts are dependent
 2 instrumentalities of the state and, consequently, are immune to suit for monetary damages under
 3 the Eleventh Amendment. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201
 4 (9th Cir. 1998); *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 972 (9th Cir.
 5 1994). Further, this Court has expressly found that the Peralta Community College District is an
 6 arm of the state and has Eleventh Amendment immunity from suit. *Ahmed v. Peralta
 7 Community College District*, WL1344636 (N.D. Cal. 2003), at *3.

8 Based upon this authority and the reasoning set forth above, just as Defendant MERRITT
 9 COLLEGE is not a “person” subject to suit under Section 1983, it similarly should not be a
 10 “person” subject to suit under Section 1981. Accordingly, Plaintiff’s claim for racial
 11 discrimination against MERRITT COLLEGE must be dismissed.

12 **2. An Individual Cannot Be Held Liable for Discrimination**

13 Plaintiff’s Fourth Cause of action also alleges that Defendant MACK discriminated
 14 against Plaintiff on the basis of her race in violation of Section 1981. This claim must also be
 15 dismissed. As noted above, “[a]nalysis of an employment discrimination claim under §1981
 16 follows the same legal principles as those applicable in a Title VII disparate treatment case ...”
 17 *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F3d 840, 850 (9th Cir. 2004) (emphasis
 18 added).

19 Under Title VII, courts have consistently held that persons such as supervisors and
 20 coworkers who do not otherwise qualify as employers may not be held individually liable for
 21 violations of Title VII (or the ADEA or ADA). *Cross v. Alabama State Dept. of Mental Health
 22 & Mental Retardation*, 49 F3d 1490, 1504 (11th Cir. 1995); see also *Miller v. Maxwell's Int'l
 23 Inc.*, 991 F2d 583, 587 (9th Cir. 1993); *Birkbeck v. Marvel Lighting Corp.*, 30 F3d 507, 510–511
 24 (4th Cir. 1994). Similarly, most federal courts, including the Ninth Circuit, have held that there
 25 is no Title VII remedy against individual supervisors or coworkers for either quid pro quo or
 26 hostile environment harassment. *Tomka v. Seiler Corp.*, 66 F3d 1295, 1314 (2nd Cir. 1995);
 27 *Miller v. Maxwell's Int'l Inc.*, 991 F2d 583, 587 (9th Cir. 1993).

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1 Here, Plaintiff alleges that she could not fully enjoy the benefits provided under her
 2 “academic agreement” with Defendant MERRITT COLLEGE due to the conduct of Defendant
 3 MACK. (Plaintiff’s First Amended Complaint at ¶ 5.) Plaintiff’s claim is analogous to a claim
 4 of discrimination in the terms and conditions of employment due to the conduct of an individual
 5 supervisor or co-worker under Title VII. Pursuant to the authority above, just as an individual
 6 cannot be held liable for alleged discrimination under Title VII, an individual should not be held
 7 liable for alleged discrimination in violation of Section 1981. Accordingly, Plaintiff’s claim for
 8 race discrimination in violation of Section 1981 must be dismissed as a matter of law.

9 **D. Plaintiff’s Claims For Negligent Misrepresentation And Breach Of Implied-
 10 In-Fact Contract Fail As A Matter Of Law**

11 **1. The Tort Claims Act Abolished All Common Law and Judicially
 12 Declared Forms of Liability Against Public Entities**

13 One of the principal objectives of the California Tort Claims Act (“the Act”) was to
 14 reduce uncertainty in the law by making all governmental tort liability statutory. Government
 15 Code Section 815(a) summarizes this principle by providing: “except as otherwise provided by
 16 statute, [a] public entity is not liable for an injury, whether such injury arises out of an act or
 17 omission of the public entity or a public employee or any other person.” As one court put it,
 18 Section 815 “amounts to a legislative declaration that governmental immunity from suit is the
 19 rule and liability is the exception.” *Trinkle v. Calif. State Lottery*, 71 Cal.App.4th 1198, 1202
 (1999).

20 Under the Act, all governmental liability is statutory, except as required by the state and
 21 federal constitutions. *Nestle v. City of Santa Monica*, 6 Cal.3d 920, 932 (1972). “[I]n the
 22 absence of some constitutional requirement, public entities may be liable only if a statute
 23 declares them to be liable.” *Harshbarger v. City of Colton*, 197 Cal.App.3d 1335, 1339 (1988).
 24 Thus, the Act abolished all common law or judicially declared forms of liability against public
 25 entities. *Michael J. v. Los Angeles County Dept. of Adoptions*, 201 Cal.App.3d 859, 866 (1988).
 26 Further, Government Code Section 818.8 expressly provides that public entities are absolutely
 27
 28

1 immune from suit for any injuries caused by misrepresentation, whether it be negligent or
2 intentional.

3 Here, Plaintiff alleges state common law claims against Defendant MERRITT
4 COLLEGE for breach of implied-in-fact contract and negligent misrepresentation. (Plaintiff's
5 First Amended Complaint at 11:2-3; 15:6-7.) With respect to Plaintiff's claim for negligent
6 misrepresentation, the claim is clearly barred by Section 818.8. With respect to Plaintiff's claim
7 for breach of implied-in-fact contract, her First Amended Complaint does not cite to any
8 provision in any statute which imposes governmental liability for this claim. Indeed, because
9 there is no statute making public entities liable for this claim, the general rule of governmental
10 immunity must prevail, and Plaintiff's claims must be dismissed.

2. Plaintiff's First Amended Complaint Does Not Plead Compliance With the Claim Presentation Requirements of the Act

13 In addition to the reasons set forth above, Plaintiff's claims for breach of implied-in-fact
14 contract and negligent misrepresentation are also barred due to Plaintiff's failure to plead
15 compliance with the claim presentation requirements of the Act. The Act requires that all claims
16 for *money or damages* must first be presented to the pertinent public agency and rejected by it.
17 “Generally speaking, no suit for money or damages may be brought against a public entity on a
18 cause of action for which a claim is required to be presented until a written claim has been
19 presented to the public entity and has been acted upon by the board, or has been deemed to have
20 been rejected by the board.” *Spencer v. Merced County Office of Education*, 59 Cal.App.4th
21 1429, 1434-35 (1997). “Under Government Code section 945.4, presentation of a timely claim is
22 a condition precedent to the commencement of suit against the public entity.” *Id.*

23 A claim for personal injury must be presented to the public agency not later than six
24 months after the accrual of the cause of action. Government Code §911.2. Claims relating to
25 any other cause of action, including breach of contract, must be filed within one year after the
26 accrual. Government Code §911.3. The burden of proof is on the plaintiff to show satisfaction
27 of the statutory prerequisites to filing suit. *State v. Superior Court (Bodde)*, 32 Cal.4th 1234,

1 1239 (2004) (complaint that fails to allege facts demonstrating compliance is subject to
 2 demurrer).

3 Pursuant to Government Code Section 910, the essential contents of a claim include: 1)
 4 the names and addresses of the claimant and the person to whom notices are to be sent; 2) a
 5 statement of the date, place, and other circumstances of the occurrence or transaction; 3) a
 6 description of the indebtedness, obligation, injury, damage, or loss incurred; 4) the name of the
 7 public employee who caused the injury, if known; and 5) the amount claimed, if less than
 8 \$10,000, on the date the claim is presented or, if more than \$10,000, no dollar amount is to be
 9 included, but the claim must state whether the claim is to be a limited civil case. Further, the
 10 claimant must pay a filing fee when the claim is filed. Government Code §905.2.

11 Here, Plaintiff seeks money damages from Defendant MERRITT COLLEGE for breach
 12 of implied-in-fact contract and negligent misrepresentation. Plaintiff's First Amended
 13 Complaint however does not allege compliance with the claims presentation requirements of the
 14 Act. Indeed, Plaintiff's allegations are incredibly vague and insufficient on their face, as
 15 Plaintiff merely asserts in blanket fashion that Plaintiff "filed a written complaint with Merritt
 16 College in compliance with the Government Code, and several written complaints with different
 17 departments and Librarians." (Plaintiff's Amended Complaint at ¶28.) Plaintiff does not even
 18 attempt to allege compliance with the various substantive requirements of the Act. Moreover,
 19 Plaintiff does not allege *the date* on which the Claim was allegedly presented. This is fatal
 20 because the court cannot determine based on Plaintiff's allegations whether Plaintiff presented a
 21 claim in a timely fashion.³ Plaintiff clearly has not pled compliance with the requirements of the
 22 Act, and accordingly, her claims for breach of implied-in-fact contract and negligent
 23 misrepresentation are also barred on this ground.

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27 ³ Plaintiff, cannot, in good faith, identify the date on which she filed a Government Claim, because she *never* filed
 28 one.

E. Plaintiff's Claim For Intentional Infliction Of Emotional Distress Against Defendant Mack Fails As A Matter Of Law

1. Plaintiff's First Amended Complaint Does Not Plead Compliance With the Claim Presentation Requirements of the Tort Claims Act

The claims procedures and the statute of limitations applicable to actions against public employees are the same for actions against public entities. Government Code §950.2; see also, generally, Government Code §§ 950-950.6. Thus, presentation of a claim to the public employer, and the public employer's rejection of the claim, are prerequisites to legal action against public employees for acts and omissions within the course and scope of employment. Government Code §950.2. Compliance with the requirement is an integral part of a plaintiff's cause of action that must be pleaded and proved. *Taylor v. Mitzel*, 82 Cal.App.3d 665, 671 (1978). The operative fact triggering the claims presentation requirements is that, at the time of the alleged tortious act or omission, the defendant was within the scope of employment as a public employee. When this fact appears from the pleadings, and the plaintiff fails to show compliance with the claims-presentation requirements, dismissal of the action on demurrer is warranted. *Neal v. Gatlin*, 35 Cal.App.3d 871 (1973) (demurrer sustained).

Here, Plaintiff's allegations regarding Defendant MACK relate solely to steps allegedly taken by Defendant MACK in her capacity as a College Librarian, and in seeking to enforce a policy of the library. Such conduct is clearly within the course and scope of employment, thereby triggering the claims presentation requirements of the Act. For the same reasons discussed above however, Plaintiff clearly has not pled compliance with the Act's requirements. Accordingly, Plaintiff's claim against Defendant MACK for intentional infliction of emotional distress is barred, and must be dismissed as a matter of law.

2. Plaintiff's First Amended Complaint Does Not Allege "Extreme and Outrageous" Conduct

Even if Plaintiff could demonstrate that she somehow pled compliance with the claim presentation requirements of the Act (which she cannot), Plaintiff's allegations would still warrant dismissal. An essential element of a cause of action for intentional infliction of

1 emotional distress is “extreme and outrageous conduct by the defendant.” *Yurick v. Superior*
 2 *Court*, 209 Cal. App. 3d 1116, 1123 (1989). Extreme and outrageous conduct has been defined
 3 as conduct which is severe, outrageous and beyond all bounds of decency:

4 . . . conduct which goes beyond all possible bounds of decency so as to be
 5 regarded as atrocious and utterly intolerable in a civilized community. Extreme
 6 and outrageous conduct is not mere insults, indignities, threats, annoyances, petty
 7 oppressions, or other trivialities. All persons must necessarily be expected and
 8 required to be hardened to a certain amount of rough language and to occasional
 9 acts that are definitely inconsiderate and unkind. Extreme and outrageous
 10 conduct, however, is conduct which would cause an average member of the
 11 community to immediately react in outrage.

12 *Id.* at 1128. The requirements of the rule are rigorous, and difficult to satisfy. *Cole v. Fair Oaks*
 13 *Fire Protection Dist.*, 43 Cal. 3d 148, 155 (1987) (no recovery for mere profanity, obscenity, or
 14 abuse, without circumstances of aggravation, or for insults, indignities or threats which are
 15 considered to amount to nothing more than mere annoyances.)

16 California appellate courts have affirmed orders sustaining dispositive motions on the
 17 ground that the defendant’s conduct was not sufficiently outrageous. *Ankeny v. Lockheed*
 18 *Missiles & Space Co.*, 88 Cal. App. 3d 531, 536-37 (1979) (plaintiff alleged defendant prevented
 19 him from becoming union steward, assigned him inappropriate job tasks, and personally insulted
 20 him); *Schneider v. TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) (plaintiff’s supervisor
 21 screamed, yelled and made threatening gestures while criticizing plaintiff’s job performance;
 22 *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1128 (1989) (plaintiff claimed age
 23 discrimination and that defendant called her “senile” and a “liar” in front of others).

24 Here, Plaintiff alleges that on five (5) occasions, Defendant MACK wrongfully accused
 25 Plaintiff of improperly using College computers for personal use in violation of library policy,
 26 thereby “forcing” Plaintiff to leave the library. Plaintiff further alleges that on one occasion,
 27 nearly one year later, Defendant MACK asked Plaintiff and a classmate to stop talking in the
 28 library while allowing others to continue talking. Even assuming for the purposes of this motion
 that each of these facts is true (which they are not), these facts do not constitute “extreme and
 outrageous” conduct under the foregoing authority. Indeed, Plaintiff does not allege that

1 Defendant MACK threatened her or made a single derogatory or racially-based statement to her
2 on any occasion. Courts have refused to allow emotional distress claims in cases where the
3 conduct alleged, and even proven, was far more severe than the facts alleged by Plaintiff.
4 Plaintiff's claim for intentional infliction of emotional distress must be dismissed as a matter of
5 law.

6 **V. CONCLUSION**

7 Defendants respectfully requests that this Court dismiss with prejudice, Plaintiff's claims
8 for: 1) violation of FEHA; 2) failure to prevent, investigate and remedy harassment in violation
9 of Section 1981; 3) age discrimination in violation of Section 1981; 4) race discrimination in
10 violation of Section 1981; 5) negligent misrepresentation; 6) breach of implied-in-fact contract
11 and 7) intentional infliction of emotional distress.

12 Dated: October 17, 2007

GORDON & REES LLP

13
14 By: /s/ Alyson Cabrera
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16 Attorneys for Defendants
17 MERRITT COLLEGE and
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